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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 465

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

HUGH W. DARLING,
Counsel for Appellant.

GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

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SUPREME COURT OF THE STATE OF CALIFORNIA

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Petitioner presents, with its Application for Allowance of an Appeal, this Jurisdictional Statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the orders and judgments of the Supreme Court of the State of California entered in this cause.

I

Opinions of the Supreme Court of the State of California and of the Public Utilities Commission

No opinion was issued by the Supreme Court of the State of California in denying Petitioner's petition for a Writ of Review of the order of Respondent, Public Utilities Commission of the State of California. A certified copy of the order denying a Writ of Review is attached to this Statement as Appendix A. No opinion was issued by the Su-

preme Court of the State of California in denying Petitioner's Petition for a rehearing of the order denying a Writ of Review. A certified copy of the order denying the rehearing is attached to this Statement as Appendix B. The opinion and order of Respondent, which Petitioner petitioned to have reviewed by the Supreme Court of the State of California, is attached to this Statement as Appendix C.

II

Statement of the Case

Petitioner, a federally certificated interstate commercial air carrier, on February 8, 1951, without admitting jurisdiction in Respondent, filed with Respondent an application for approval of an increase in its air coach tariff, effective March 1, 1951, from $9.95 to $11.70 for the transportation of a person between Los Angeles, California and San Francisco, California. The Los Angeles-San Francisco flight is over a segment of Petitioner's interstate federally certificated air route 63 between Los Angeles, California and Seattle, Washington.

On March 1, 1951, Petitioner, acting under applicable and mandatory provisions of the Civil Aeronautics Act of 1938, as amended, and applicable rules and regulations of the Civil Aeronautics Board, received permission to and did increase its air coach tariff between Los Angeles and San Francisco from $9.95 to $11.70. Had Petitioner charged less than $11.70 or if Petitioner were to refund any part of that tariff for tickets sold after March 1, 1951 Petitioner would be in violation of the Civil Aeronautics Act and subject to the penalties imposed by that Act.

On March 6, 1951, without having acted on Petitioner's application, Respondent ordered that an investigation be instituted into the reasonableness, lawfulness and propriety

of the fares, among other matters, of Petitioner and other parties, which matter was designated as Case Number 5271.

On April 24, 1951 Respondent issued its opinion and order in Case Number 5271, effective fifteen days later, May 9, 1951, purporting to authorize Petitioner to maintain an air coach tariff of $11.70 for the transportation of a person between the San Francisco Bay Airport and the Los Angeles Area Airport, and purporting to order Petitioner to make reparation, whenever possible, to passengers who had paid in excess of $9.95 for air coach transportation between Los Angeles and San Francisco from March 1, 1951, the date on which the increased tariff became mandatorily effective under the Civil Aeronautics Act of 1938, and May 9, 1951, the effective date of Respondent's order.

On May 7, 1951, in timely and legal manner, Petitioner presented to Respondent a petition for a rehearing relating to the Opinion and Order in Case Number 5271, which was denied on May 15, 1951.

On June 14, 1951 Petitioner filed with the Supreme Court of the State of California a verified Petition for a Writ of Review of the Order issued by Respondent on April 24, 1951. That petition was filed under the provisions of Section 67 of Act 6386 of Deering's General Laws of the State of California, which reads in part:

> "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined",

and under Section 1068 of the Code of Civil Procedure of the State of California and Section 4 of Article VI of the

Constitution of California. No other statutory provision exists for appealing Respondent's orders.

On August 2, 1951 the Supreme Court of the State of California denied Petitioner's petition for a Writ of Review. On August 16, 1951 Petitioner filed with the Supreme Court of the State of California a petition for a rehearing of the Order denying Petitioner's application for a Writ of Review of the Order in question. On August 30, 1951 the Supreme Court of California denied Petitioner's petition for a rehearing.

III

Statutory Provisions Believed to Sustain the Jurisdiction of the Supreme Court of the United States

The judgment of the Supreme Court of the State of California was entered August 2, 1951, and the Order denying Petitioner's petition for a rehearing was entered August 30, 1951. A Petition for Allowance of an Appeal will be presented to the Supreme Court of the State of California on October 26, 1951 concurrently with the filing of this Statement.

The jurisdiction of the Supreme Court of the United States to review by direct appeal the decision denying Petitioner's petition for a Writ of Review is conferred by Title 28, U. S. Code, Sections 1257 (2) and 2101 (c).

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review on direct appeal the Orders and Judgments of the Supreme Court of the State of California in this proceeding.

A. *The orders of the Supreme Court of the State of California are final judgments of the highest State Court.*

In *Napa Valley Electric Company* vs. *Railroad Commission of the State of California,* 251 U. S. 356, 64 L. Ed.

310, the Napa Valley Electric Company had made application to the Supreme Court of the State of California for a Writ of Review directed to the Railroad Commission of the State of California, the predecessor of the Public Utilities Commission of the State of California. The California Supreme Court denied the Petition for Review and refused to issue a Writ of Review.

> "And so with the denial of the Petition of the Electric Company,—it had like effect and was the exercise of the judicial powers of the court. And we repeat, to enable the invocation of such powers was the purpose of Section 67, and they could be exercised upon the display in the Petition of the proceedings before the Commission and of the grounds upon which they were assailed. And we agree with the district court that 'the denial of the Petition was necessarily a final judicial determination, based on the identical rights' asserted in that court and repeated here. 251 U. S. 356, 272-273; 64 L. Ed. 310, 313.
>
> * * * * * * *
>
> "That the court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented and its subsequent conclusive effect upon the rights of the Electric Company." 251 U. S. 356, 373; 64 L. Ed. 310, 314.

In commenting on the Napa Valley Electric case the court in *Adams* vs. *Decoto*, 21 Fed. 2d. 221, (Dist. Ct. S. D. Cal. S. D. 1927) stated:

> "In the case of *Napa Valley Electric Co.* v. *Railroad Commission of California*, et al., 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310, the Supreme Court of the United States held that, under Section 67 of the Public Utilities Act of California, as construed by the Supreme Court of the State, a petition to that court for a Writ

of Review to bring up proceedings of the Board of Railroad Commissioners, in which rates for electric power were fixed in alleged violation of constitutional rights and excess of the board's jurisdiction may be disposed of upon the merits by an order simply refusing the Writ, if the facts are fully stated in the petition; the provisions for issuing such Writ and for subsequent decision upon the record from the board not being mandatory in such cases.

"The Supreme Court there also further held that, in a suit brought in the United States District Court to enjoin enforcement of rates fixed by such board, it will be presumed that a petition, not in the record, upon which the state Supreme Court refused a Writ of Review, exhibited the board's proceedings and presented the questions which that court was empowered to decide, viz. whether the board pursued its authority and whether any constitutional right, state or federal, was violated, and that the order refusing the Writ will be deemed conclusive of such questions, although not accompanied by an opinion of the state court.

"The plaintiff, Adams, if he was not satisfied with the decision of the Supreme Court of California, could, had he elected to do so, have taken his case to the Supreme Court of the United States for adjudication, for that court expressly held, in the case of *Williams* v. *Bruffy*, 102 U. S. 248, at page 255, 26 L. Ed. 135, that 'whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will, upon a proper proceeding attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a Writ of Error of Supersedeas, or by dismissing a Writ previously allowed. And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the

appellate court of the state, or to the inferior court whose judgment is reversed.'" Ps. 225-6.

The following cases confirm the point.

"The denial of a review by the State Supreme Court, [of a decision of the California Railroad Commission] to which application had been made pursuant to Gen. Laws Cal. 1931, title 464, Act. 6386, Section 67, is efficacious as an affirmance, to give finality to the Commission's Order . . ."

Southern Pac. Co. v. *Van Hoosear*, 72 Fed. 2d 903, 905 Circuit Court of Appeals, Ninth Circuit (1934)

"Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will, upon a proper proceeding, attach."

Williams v. *Bruffy*, 102 U.S. 248, 26 L. Ed. 135, 137.

B. *A state constitution is a statute within the meaning of 28 USCA 1257 (2).*
Delmas v. *Merchants' Insurance Co.*, 81 US 661; 20 L. Ed. 757, 759

C. *The validity of a California statute on the ground of its being repugnant to the Constitution of the United States has been drawn into question and the highest court of California has held it valid.*

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore reviewable by writ of error under sec. 237 of the Judicial Code."

Fiske v. *Kansas*, 274 US 380, 385; 71 L. Ed. 1108, 1111

IV

Manner by which Federal questions were raised.

The federal questions sought to be reviewed were raised first on March 14, 1951 at the commencement of the hearing before the Public Utilities Commission of the State of California. At that time Petitioner objected to the proceedings on the grounds that the Congress had pre-empted the field of commercial air transportation and that Respondent had no jurisdiction over Petitioner:

> "Congress has pre-empted this field and therefore has exclusive jurisdiction." (Rep. Tr. p. 8 ls. 14-15)
>
> "Mr. Hall: On behalf of Western Air Lines I would like to interpose the same observations and in addition, I would like to state, and I think it is important, that in so far as the investigation relates to the increase in tariff, coach tariffs, those increases were made by the request of the Civil Aeronautics Board and an appropriate tariff has been filed with that Board." (Rep. Tr. ps. 8 and 9 ls. 24-26 1-4)
>
> "Mr. Hall: I haven't had a chance to go over with what counsel expects as to the cease and desist order. It seems that (until) the Commission rules on the objections to the jurisdiction of this Commission that the Commission should not go ahead and issue a cease and desist order. I think there are serious objections raised here as to whether this Commission has jurisdiction and I think those issues should be met first before we go into the matter of cease and desist."
> (Rep. Tr. p. 31 ls. 2-9)

In addition, before submitting any evidence or participating in cross-examination Petitioner repeated its objection and announced that it was not waiving any legal rights:

> "Mr. Renda: I will get to that, Mr. Examiner. With respect to the legal question of whether the Public

> Utilities Commission of the State of California has jurisdiction over this matter, I would like to reiterate once again for the record that we have not changed our position in this regard and by participating in this hearing, by cross-examining witnesses made available, by representing testimony to the record and introducing evidence of our own, that we do not waive that particular legal right. We want it clearly understood that we are reserving that right too under the circumstances."
> (Rep. Tr. P. 65, 1s. 6-16)

Later, Petitioner renewed this contention in a more formal manner in a written brief filed with the Public Utilities Commission:

> "The Public Utilities Commission of the State of California may not investigate, fix or in any way regulate the intrastate fares of air transportation companies which are engaged in interstate commerce or the transportation of mail.
>
> "As to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive and State control is altogether inadmissible. *The Minnesota Rate Cases*, 230 U.S. 352 (1913). The development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense admits of no regulation except by a single authority. Interference by the State of California in the affairs of an interstate air carrier is, therefore, a direct burden on the national power.
>
> "Be that as it may, as to those subjects which permit diversity of treatment according to the special requirements of local conditions, the States may act until Congress chooses to occupy the field. *The Minnesota Rate Cases, supra.* It follows that Congress may constitutionally so legislate with reference to interstate subjects as to exclude that which otherwise might

clearly be within a State's province, such as the right to regulate the intrastate fares of an interstate carrier.

"It is Western's opinion that the Civil Aeronautics Act of 1938 is legislation having such effect and that, therefore, by reason of Congress' having totally occupied the field, California is precluded from regulating in any fashion air carriers coming within that Act. For one thing, air carriers engaging in the transportation of mail are subjected to Federal regulation. Section 1(2) and 1(10), *Civil Aeronautics Act*. Western's air transport operations are conducted pursuant to Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board. Accordingly, all aircraft operated by Western carry or are available for the carriage of United States mail. Another indication is that every air carrier coming within the statutory definition is required to file with the Civil Aeronautics Board tariffs 'showing all rates, fares and charges for air transportation between points served by it.' Section 403, *Civil Aeronautics Act*. Such tariffs are not changeable except upon compliance with the provisions of Section 403(c) of the Act, which section contains no reference to and therefore excludes conditions imposed by State law." (Memorandum of Western Air Lines, Inc. ps. 2-4.)

The opinion and order of Respondent, issued on April 24, 1951 (P. 3-4; P. 8; P. 12) denies the validity of the federal questions thus presented by Petitioner and holds that the Civil Aeronautics Act of 1938, as amended, and the Commerce Clause of the Constitution of the United States (Article I, Section 8, Paragraph 3) do not deprive Respondent of jurisdiction.

The federal questions also were raised in Petitioner's petition for rehearing before the Public Utilities Commission to the State of California:

"The Commission erred in finding and concluding that the Civil Aeronautics Act of 1938, as amended,

does not purport to extend Federal regulation to the matter of rates and fares charged for the intrastate transportation of persons or property under authority of certificates of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the provisions of said Act.

* * * * * * *

"Because all revenues realized from the carriage of persons or property, regardless of the class of carriage, enter into the determination of air mail 'compensation,' it follows that regulation of air mail 'compensation' necessarily involves regulation of all rates and fares which produce non-mail revenues. Congress, therefore, clearly extended the regulatory authority of the Civil Aeronautics Board to the intrastate rates and fares of air carriers engaged in the transportation of United States mail. Moreover, the developmental and regulatory objectives of the Civil Aeronautics Act would be forsaken if control in any part of the rates and fares of such carriers operating pursuant to Federal authority were not subject to exclusive regulation by the Civil Aeronautics Board." (ps. 2-3)

Petitioner again raised the federal questions in its Petition for Writ of Review filed with the Supreme Court of the State of California:

"The Order of Respondent to which this Petition for a Writ of Review is addressed is unlawful and should be annulled because:

"1. The Civil Aeronautics Act of 1938, as amended, necessarily has pre-empted the entire field of civil aviation to the exclusion of the right or power of any State or any State Agency to exercise jurisdiction or authority over commercial air transportation.

"2. The Order of Respondent so far as it purports to affect Petitioner is a burden on interstate commerce and is in violation of subsection 3 of Section 8, Article I of the Constitution of the United States." (p. 14)

V

Basic Questions Presented

The basic questions which will be presented by the appeal, to one or the other of which each of the assignments of error listed in the Assignment of Errors compiled under Rule 9 of the Rules of the Supreme Court of the United States is related, are:

1. Has the Civil Aeronautics Act of 1938, as amended (52 Stat. 977; 49 USC 401 et seq), pre-empted the entire field of civil aviation to the exclusion of the right or power of any state or of any state agency to exercise jurisdiction or authority over commercial air transportation?

2. Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an interstate segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of Subsection 3 of Section 8, Article I of the Constitution of the United States?

VI

The Questions Involved are Substantial

The primary question involved, whether the activities of commercial air lines are to be controlled by the States as well as the federal government, is one of wide import affecting not only Petitioner but also all other commercial air carriers. A decision of the Supreme Court of the United States upholding the exclusive jurisdiction of the federal government under the Civil Aeronautics Act of 1938, or at least casting light on where federal control ends and state control starts, is essential to the welfare of the air transportation industry.

The decision of the Supreme Court of the State of California is at war with the construction placed upon the Civil

Aeronautics Act of 1938, as amended, by the Civil Aeronautics Board, under which the Civil Aeronautics Board has exercised jurisdiction over all activities of certificated air carriers for many years. The effect of the decision challenged thus is to create a confused situation with both a federal and a state agency attempting to exercise control over the same activities of air carriers. The merit to Petitioner's position that the Civil Aeronautics Act of 1938 has so occupied the field that state regulation is not to be permitted is fully supported by the sections of the Act set forth in Appendix D.

Petitioner, recognized as the oldest commercial air line in the United States, celebrated its twenty-fifth anniversary on April 17, 1951. In this relatively short span of time the commercial air transportation industry has grown from a jest-inspiring private venture to one of the most important national public utilities in the country. Its indispensability to the transportation of mail is conceded. Its importance to the national defense was proved with high laurels during the last war and is being reproved by the current Korean conflict and the defense program. Yet case law lags sadly behind the industry's quick maturity.

Much state legislation now claimed to apply to air transportation was enacted with an eye only upon ground transportation, to which air transportation bears but remote and minor relationship. What might have been good for the railroads or the buslines, or what might have advanced the public welfare as wedded to ground transportation, too often, if forced into application, would burden the air lines and undermine the public welfare concerning air transportation.

Today the commercial airplane will leave New York and land in Los Angeles between dawn and dusk and in the process will cross a dozen states. The best train takes

three days and three nights, and the best bus four days and three nights to do the same job. Thus it is that the air transportation industry, to a vastly greater extent than any type of ground transportation, must be guided by only one master and must be freed completely from the shackles of forty-eight separate state masters. Otherwise interstate commerce in the air will not simply be burdened, it will deteriorate completely.

It is unthinkable that a tolerable condition could exist in commercial air transportation with forty-eight different sets of safety regulations superimposed on one set of federal safety regulations. Federal regulations provide that north bound and east bound instrument flights shall be at the odd thousand level, with south bound and west bound flights at the even thousand level when not flying on a controlled airway. If each state were to exercise sovereignty of the skyways and decide independently of all other states and of the federal government at what level flights should be maintained during instrument flying, blind flying, including night flying, would come to an end. Recognizing the absolute necessity for a single safety director no state has yet had the temerity to challenge the exclusive power of the federal government in the area of air traffic safety. Should the issues here involved be not decided firmly and correctly that temerity may soon disappear.

From the standpoint of lives and limbs conflicting economic regulations might not be as destructive or as deadly as conflicting safety regulations. But from the standpoint of the efficiency, the financial stability and the survival of the air transportation industry under private ownership uniformity of economic regulations is just as important as uniformity of safety regulations.

Each federally certificated air route is a combination of intrastate segments. If it be held that each state has control

over the tariff which may be charged by air carriers for transportation of persons or property over intrastate segments, the Civil Aeronautics Board will lose effective control of its power to fix the rates for the transportation of mail as granted by Section 406 of the Civil Aeronautics Act (49 U.S. Code 486). All income of air carriers, including revenue from intrastate transportation, has to be considered in determining the mail rate. This makes it quite plain that the Congress did not intend that the states should have any control over intrastate tariff which necessarily would vest indirect but effective control over air mail rates. The cumulative effect on air mail rates if each of the forty-eight states controlled the passenger and freight tariffs over intrastate segments of federally certificated air routes requires no amplification.

If the air transportation industry must come to heel before forty-eight little Civil Aeronautics Boards in addition to the federal Civil Aeronautics Board and comply with the tariff rates and regulations and with the conditions of labor and the other economic regulations which each independently chooses to impose within the confines of its own territorial boundaries, chaos will be complete and single federal ownership will become the only solution.

It is of compelling importance to the air transportation industry that a decision of the Supreme Court of the United States be issued declaring that commercial air transportation in all of its phases is constitutionally exempt from state control or interference.

VII

Statutes Involved

The issues involve the constitutional validity of Sections 17, 20, 21, 22, 23 and 24 of Article XII of the California Constitution as applied to certificated air carriers.

Petitioner takes the position that these sections are not applicable to air carriers because they are in conflict with the commerce clause of the Constitution of the United States and in conflict with certain sections of the Civil Aeronautics Act of 1938, as amended, which Act petitioner contends pre-empts the entire field of civil aviation.

The six sections of Article XII of the California Constitution which are involved are set forth verbatim in Appendix D. In addition Appendix D sets forth verbatim Paragraph 3, Section 8, Article I of the Constitution of the United States and Sections 2, 205(a), 301, 401(a), 403(a), 403(b), 403(c), 404(a), 601(a), 902(a), 902(d), 1002(d), 1005(e) of the Civil Aeronautics Act of 1938, as amended, (49 U.S.C. Sections 402, 425(a), 451, 481, 483, 483(b), 483(c), 484(a), 551(a), 622(a), 622(d), 642(d), 645(e)), which are in conflict with the designated sections of Article XII of the California Constitution and which disclose that the Civil Aeronautics Act necessarily has pre-empted the entire field of commercial air transportation.

October 26, 1951.

Respectfully submitted,

HUGH W. DARLING,
Counsel for Petitioner.

GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

EXHIBIT "A"

ORDER DENYING WRIT OF REVIEW

S.F. No. 18427

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

WESTERN AIR LINES, INC.

v.

PUBLIC UTILITIES COMMISSION, ETC.

Petition for writ of review DENIED.

Edmonds, J. Carter, J. voting for issuance of a writ.

GIBSON,
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 26th day of October A.D. 1951.

WILLIAM I. SULLIVAN, *Clerk*

[SEAL] By A. R. FAIRWELL,
Deputy Clerk

EXHIBIT "B"

Order due Sept. 1, 1951

ORDER DENYING REHEARING

S.F. No. 18427

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

WESTERN AIR LINES, ETC.

v.

PUBLIC UTILITIES COMMISSION, ETC.

Petitioner's application for rehearing DENIED.

Edmonds, J. Carter, J. and Spence, J. voting for a rehearing.

GIBSON,
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 26th day of October A.D. 1951.

WILLIAM I. SULLIVAN, *Clerk*

[SEAL] By A. R. FAIRWELL,
Deputy Clerk

EXHIBIT "C"

Decision No. 45624

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5271

Investigation Into the Fares, Rules, Regulations, Charges, Services, Operations and Practices of Arrow Airways, Inc.: California Central Airlines; KENNETH G. FRIEDKIN, Doing Business as Pacific Southwest Airlines; Robin Airways, Inc.; Southwest Airways Company; Transcontinental & Western Air, Inc.; United Air Lines, Inc. and Western Air Lines, Inc.

APPEARANCES

Ray E. Costello, for Southwest Airways Company, respondent.

Donald Keith Hall and D. P. Renda, for Western Air Lines, Inc., respondent.

Kenneth G. Friedkin, for Pacific Southwest Airlines, respondent.

John W. Preston, Jr., for California Central Airlines, respondent.

Charles Stearns, for United Air Lines, Inc., respondent.

David G. Shearer, for Trans World Airlines, Inc., respondent.

Norman D. Kessler, for Robin Airways, Inc., respondent.

Wilson E. Cline, C. H. Jacobsen and Thomas A. Hopkins, for the staff of the Public Utilities Commission of the State of California.

OPINION

This proceeding is an investigation upon the Commission's own motion into the reasonableness, lawfulness and propriety of the fares, rules, regulations, charges, services, operations and practices of respondent air lines for the

transportation of passengers between the San Francisco Bay area and the Los Angeles area.

Public hearings were held before Commissioner Craemer and Examiner Bryant at Los Angeles on March 14 and 27, 1951. Briefs have been filed. The matter is ready for decision.

This investigation was instituted by the Commission upon receipt of information that fares were being assessed for socalled "coach" transportation in excess of those named for such service in the tariffs on file with the Commission. The eight air carriers maintaining published fares between the San Francisco and Los Angeles areas were made respondents.

Factual evidence was offered by representatives of various of the carriers and by members of the Commission's staff. The record shows that certain of the respondents are not offering the coach services with which this investigation is primarily concerned. Arrow Airways, Inc., is no longer operating common carrier service of any nature, and has requested that the tariff which it heretofore filed for California operations be canceled.[1] Similarly, a member of the Commission's staff testified that the operations of Robin Airways have been suspended or discontinued. Southwest Airways Company and Trans World Airlines, Inc. (formerly Transcontinental & Western Air, Inc.) have no coach operations between California points, and there is no evidence in this proceeding that either of these companies has made any unauthorized increase in fares or otherwise operated unlawfully or improperly. Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, operates a coach service between the San Francisco and Los Angeles areas. The record shows that his fare for this service was maintained at $9.95 until March 28, 1951, on which date he increased it to $11.70, under authorization from this Commission.[2] The evidence is clear that Friedkin properly continued to assess and collect the lower fare until his tariff was lawfully amended. As to these three car-

[1] Exhibit No. 6.

[2] Authority No. 21-12-121 of March 20, 1951.

riers the investigation may be discontinued upon cancellation of the inoperative tariffs.

The remaining respondents are California Central Airlines, United Air Lines, Inc. and Western Air Lines, Inc. As to these three carriers the essential facts are similar and undisputed. Each of them operates coach flights between the San Francisco and Los Angeles areas. For some time prior to March 1, 1951, California Central Airlines maintained for this service a one-way fare of $9.99 and the other two companies maintained a fare of $9.95. Effective with that date each of the companies started to collect and thereafter continued to collect a fare of $11.70. Each of the companies had filed with the Commission, prior to March 1, an application seeking authority to make the fare increase. None of the applications had been granted prior to March 1, nor have they yet been granted.[3]

At the conclusion of the taking of evidence the Commission's staff moved that the Commission promptly issue a preliminary order requiring the three respondents (1) to cease and desist charging passenger fares for air line coach travel in excess of the authorized fares set forth in their tariffs on file with the Commission, (2) to prepare and maintain a record of the names and addresses of all persons from whom more than the authorized fares have been or may be collected subsequent to February 28, 1951, and (3) to make reparation of the excess of the unauthorized fares over the authorized fares to all passengers whose names and addresses are reasonably ascertainable. Replies to the motion were, by agreement, incorporated in the briefs filed by the three respondents.

At the hearing and in their briefs the three carriers urged various extenuating circumstances. Primarily they challenged the Commission's power to regulate in any respect the activities and business of air transportation companies. They contended, and offered evidence to establish, that the fare increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the com-

[3] It was these circumstances which impelled the institution of this proceeding.

panies construed to be tantamount to a demand. They asserted that in any event the $11.70 fare is fully justified, and, without waiving their objection that the Commission lacks jurisdiction, introduced financial and other evidence designed to support the assertion.

The jurisdictional question may be considered first. The respondents argue on various grounds that the provisions of Article XII of the California Constitution are not applicable to air carriers, that the constitutional sections are not self-executing, and that the California legislature has not made a specific grant of power to the Commission to regulate air carriers. United Air Lines, Inc., and Western Air Lines, Inc., assert further that the regulation of air commerce is a field which has been completely occupied by the Federal government under the Civil Aeronautics Act of 1938. United Air Lines, Inc., advance the additional argument that its operations in question are interstate in nature.

Article XII of the California Constitution contains many provisions which are pertinent to the jurisdictional question. Section 17 of said Article provides that, "All railroad, canal, and other transportation companies are declared to be common carriers, . . ." Section 23 of said Article, in part, states "every common carrier, is hereby declared to be a public utility . . ."

The staff on cross-examination of witnesses for the airlines developed the fact and we now find that the three air carriers, California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., which have increased their coach fares without Commission authorization offer their services to the public in general. Counsel for United Air Lines, Inc., in their brief admit that United is a common carrier.

In the recent case of *State ex Rel. State Railway Commission* v. *Ramsey* (1949), 151 Nebr. 333, 27 N. W. (2d) 502, the Supreme Court of Nebraska in considering whether air carriers are common carriers as that term is used in the Nebraska Constitution laid down the following principles:

> ". . . A Constitution is intended to meet and be applied to any conditions and circumstances as they

> arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply to all things to which they are in their nature applicable. . . . These principles have been held to be applicable to transportation by air. . . . Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization engaged in transportation by air for hire is a common carrier" (p. 338 Nebr. Reports).

The California Supreme Court had under consideration in *Western Association of Short Line Railroads* v. *Railroad Commission* (1916), 173 Cal. 802, 162 Pac. 391, the question whether companies engaged in the then new businesses of transporting freight in motor trucks and passengers in automobile stages were "other transportation companies" referred to in Article XII of the California Constitution. The Court unequivocally held that they were public transportation companies, common carriers, and public utilities.

In light of the foregoing cited constitutional provisions and judicial decisions, we find and hold that the herein air carriers operating under coach fares between the Los Angeles area and the San Francisco Bay area are transportation companies, common carriers and public utilities.

We now turn to the question whether the Public Utilities Commission has jurisdiction over the air carriers with respect to increases in fares charged for transportation between points within the State of California.

Section 20 of Article XII of the California Constitution, in part, provides:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad

commission provided for in this Constitution, that such increase is justified, . . ."

Section 22 of Article XII of the California Constitution, in part, provides:

> "Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said Commission than the rates, fares and charges which are specified in such tariff. . . ."

In the *Short Line Railroads* case, supra, the Supreme Court ordered that a peremptory writ of mandate issue requiring the Commission to assume the jurisdiction conferred by the above-quoted portion of Section 22. With reference to the absence of enabling legislation, the Court stated at page 804:

> "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant."

That decision is a clear statement that the provisions of said Section 22 of the constitution are self-executing, and that the Commission must exercise the authority therein conferred regardless of any absence of legislative enactments. While the Court did not refer to Section 20, there is no reason why the same construction would not be given that section.

Various of the respondents have referred to *In Re Martinez* (1943), 22 Cal. (2d) 259, 138 P. (2d) 10, as being contrary to the principles above set forth. It is true that the *Martinez* case contains dictum to the effect that the

Commission may exercise jurisdiction only where such jurisdiction is given by the legislature. However, in the *Martinez* case the Court had under consideration Section 23 of Article XII which reads, in part, as follows:

> ". . . The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

The grant of jurisdiction to the Commission over intrastate rates of air carriers is found in Sections 20 and 22 of Article XII of the constitution. The provision quoted from Section 23 of said Article can claim no priority over Sections 20 and 22 of said Article unless the former provision is more specific than the latter. As a matter of fact the latter are more specific than the former with respect to the regulation of rates of "other transportation companies." Should there be any possible ground for doubt on this point the provisions of Section 23 are conclusive against the contentions of respondents. Said Section 23 further provides, in part, as follows:

> ". . . Nothing in this section (Section 23 of Article XII) shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith."

In the face of these plain and unambiguous provisions of the constitution and in view of the holding in the *Short Line Railroads* case, supra, the dictum in the *Martinez* case cannot be considered as establishing a rule of law contrary thereto.

The Civil Aeronautics Act does not purport to extend economic regulation to intrastate transportation of persons

or property other than mail. The states are therefore free to regulate intrastate rates and fares of air carriers to the same extent as they regulate intrastate rates and fares of railroads, trucking and bus companies, and telephone and telegraph utilities. (Cooley v. Board of Port Wardens (1851), 12 How. (U. S.) 299, 13 L. ed. 996; Minnesota Rates Cases (1913), 230 U. S. 352, 57 L. ed. 1511; Eicholz v. Public Service Commission (1939), 306 U. S. 268, 83 L. ed. 641; Smith v. Illinois Bell Telephone Co. (1930), 282 U. S. 133, 75 L. ed. 255; Lindheimer v. Illinois Bell Telephone Co. (1934), 292 U. S. 150, 78 L. ed. 1182.)

Based upon the law and the facts we hold that the jurisdiction of the Commission in the premises is clear and that such jurisdiction should be exercised. The contention of respondents to the contrary we hold to be without merit.

A number of exhibits were submitted in justification of the reasonableness of the $11.70 fare. Among these was a 17-page interdepartmental memorandum of the Civil Aeronautics Board consisting essentially of estimates of revenues generated and expenses incurred by United Air Lines, Inc., and Western Air Lines, Inc., for air coach operations on the Pacific Coast. According to this memorandum, United incurred a loss of $73,461 in the San Francisco-Los Angeles operations for the period May through August, 1950, and Western similarly incurred a loss of $27,478 for the period June through August, 1950.[4] It was pointed out that the fare of $11.70 represents an increase of approximately one-half cent per passenger mile over the $9.95 fare, and that it results in a per-mile fare of about 3½ cents. According to the Civil Aeronautics Board, this contrasts with recently increased fares of 4½ cents per passenger mile now generally prevailing throughout the rest of the country for air coach services. The record in this proceeding is clear that the $11.70 fare was developed, recommended, and in fact urged upon the carriers by that Board.

United Air Lines, Inc., through its traffic manager, introduced additional evidence concerning the operation of its coach flights between the San Francisco and Los Angeles

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[4] The estimated losses are on the basis of fully allocated costs.

areas. For its revenue and expense allocations, however, this company offered only the aforesaid analysis made by the staff of the Civil Aeronautics Board. United did not submit comparable estimated results for the future. The following table shows actual operating experience at the $9.95 fare as developed by the Board's staff and submitted by the company. A second column shows, for comparative purposes, the results which would have obtained for the same period if the higher fare had applied and all other conditions were unchanged.

UNITED AIR LINES, INC.

(Four Months Ending with August, 1950)

	Actual Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare	
Revenues	$549,629	$549,629	
Additional Revenue from Increased Fare	.....	(1) 96,735	
Total Operating Revenues	$549,629	$646,364	
Operating Expenses			
Flying Operations	$121,884		
Direct Maintenance Flight Eqpt.	36,549		
Depreciation—Flight Eqpt.	63,378		
Ground & Direct Maintenance	38,160		
Ground Operations	90,083		
Stewardesses' Salaries & Expense	8,054		
Passenger Insurance & Supplies	9,847		
Traffic and Sales	90,529		
Advertising and Publicity	11,703		
General and Administrative	47,881		
Depreciation—Ground Eqpt.	16,925		
General Headquarters Expense	88,097		
Total Operating Expense	$623,090	$623,090	(2)
Net Operating Profit (3)	($73,461)	23,274	
Operating Ratio (3)	113.4%	96.4%	

( ) Denotes Loss

(1) Revenue resulting from a 17.6 per cent increase in fares.
(2) Carrier did not submit 1951 estimated expenses.
(3) Before federal income taxes.

The director of budgetary controls of Western Air Lines, Inc. introduced and explained an exhibit showing month-by-month results of coach operations between the San Francisco and Los Angeles areas for the nine months from June, 1950, through February, 1951. The increase in passenger revenues, assuming a fare of $11.70 instead of $9.95, was included, but this company, like United, did not submit estimated revenues or expenses for the future. The actual and adjusted figures for Western Air Lines, Inc. are shown in the table which follows:

WESTERN AIR LINES, INC.
(Nine Months Ending with February, 1951)

	Actual (1) Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare	
Revenues	$1,063,527	$1,063,527	
Additional revenue from increased fare		184,793	(2)
Total Operating Revenue	$1,063,527	$1,248,320	
Operating Expenses:			
Flight Operations	$263,881		
Direct Maintenance	94,114		
Depreciation of Flight Eqpt.	126,000		
Indirect & Ground Expense	683,770		
Total Operating Expenses	$1,167,765	$1,167,765	(3)
Net Operating Profit (4)	(104,238)	$80,555	
Operating Ratio (4)	109.8%	93.6%	

( ) Denotes Less.

(1) February costs based on January experience prorated for 28 days.
(2) Additional revenue resulting from the increased fare as estimated by the witness.
(3) Carrier did not submit 1951 estimated expenses.
(4) Before federal income tax.

California Central Airlines, which operates wholly within the State of California, derives approximately 90 per cent of its revenue from coach flights between the San Francisco and Los Angeles areas. The operations of this company were not included in the staff report of the Civil Aeronautics Board. Exhibits submitted by the company show revenues, expenses, and estimated costs, as well as various plane-mile and passenger-mile data. According to

the evidence, the company earned in the year 1950 a net profit of $1,512; and, if the higher fare and certain increased expenses had been in effect during the year, would have received an estimated net profit of $20,104. The operating ratios would be 99.8 per cent and 98.0 per cent, respectively. The figures as submitted by this company are summarized in the following table:

CALIFORNIA CENTRAL AIRLINES
(Twelve-Month Period)

	Year 1950 Actual Experience at $9.99 Fare	Year 1951 Estimated Experience at $11.70 Fare	
Operating Revenues	$855,145	$981,371	(1)
Operating Expenses:			
Flying Operations	$605,290		
Ground Operations	31,508		
Ground & Indirect Maintenance	8,995		
Passenger Service	15,600		
Traffic and Sales	114,806		
Advertising & Publicity	31,537		
General & Administrative	44,564		
Depreciation—Ground Property	1,333		
Total Operating Expenses	$853,633	$961,267	(2)
Net Operating Revenues (3)	$1,512	$20,104	
Operating Ratio (3)	99.8%	98.0%	

(1) Revenue resulting from the 17.1 per cent increase in fares and an estimated diminution of five per cent in the number of passengers carried.
(2) The estimated expenses for 1951 were not segregated by accounts.
(3) Before federal income tax.

None of the companies supplied all of the supporting or underlying data which would be desirable. Nevertheless, considering all of the circumstances of record, the evidence is convincing, and we find as a fact, that the higher fare is justified. Publication, filing and maintenance of the fare will be authorized.

It is entirely clear, however, and indeed it is not disputed, that California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., increased their fares without first receiving authorization from this Commission. Timely requests for authority to make the increase were filed, but the showings required by the state constitution were made belatedly, and were incomplete at the time the instant

investigatory proceeding was instituted and notice thereof served upon the respondents. The order which follows will authorize publication and maintenance of the $11.70 fare for the future. These companies are hereby placed on notice that they are and will hereafter be deemed to be "transportation companies" within the meaning of the Constitution of the State of California, and that they are subject to the prohibitions and requirements of said constitution. We also call the attention of these companies to Section 76(a) of the Public Utilities Act, which provides:

> "Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

In view of the fact that these air carriers since March 1, 1951, have been charging fares in excess of the fares reflected by their tariffs on file with this Commission as applied to coach operations between the San Francisco Bay area airports and the Los Angeles area airports, we are of the opinion that amounts collected in excess of such tariff fares should be refunded, wherever possible, to passengers who have paid the same and such direction will be incorporated in the order following this opinion. Sections 20, 21 and 22 of Article XII of the State Constitution require that such reparation be made.

There is some evidence, not hereinbefore discussed, relative to possible failure of some of the respondents to comply strictly with their filed tariff rules governing refunds or exchanges of unused tickets. This subject was subordinate to the basic issues in this proceeding, and the evidence thereon was in any event inconclusive. On this subject we make no finding of fact.

ORDER

Public hearings having been had in the above-entitled proceeding, evidence having been received and duly considered, the Commission now being advised and basing its order upon the findings and conclusions set forth in the preceding opinion,

IT IS HEREBY ORDERED:

1. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby authorized to publish, file and maintain a one-way adult coach fare of $11.70 for transportation of passengers between San Francisco Bay area airports on the one hand and Los Angeles area airports on the other hand.

2. That California Central Air Lines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby ordered to make reparation, wherever possible, to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand and the Los Angeles area airports on the other hand, in excess of the fares as reflected by the tariffs of these air carriers on file with this Commission.

3. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., and all other of the respondents operating as common carriers, be and they are hereby adjured and admonished that they may not, for the transportation of passengers and property in intrastate commerce between points within the State of California, raise any rate of charge under any circumstances whatsoever except upon a showing before the Commission that such increase is justified, make unreasonable charges, discriminate in charges or facilities, nor in any other manner violate any of the provisions of Article XII of the Constitution of the State of California applicable to transportation companies.

4. That tariffs heretofore filed with this Commission by Arrow Airways, Inc., and Robin Airways, Inc., naming fares, rules and regulations governing transportation of passengers between points in this state, be and they are hereby canceled.

5. That the several pending motions for dismissal of the proceeding as to particular respondents, and the pending motion for issuance of a "preliminary order", be and they are hereby denied.

6. That, upon the effective date of this order, this investigation be and it is hereby discontinued.

The Secretary is hereby directed to cause a certified copy of this decision forthwith to be served personally on Arrow Airways, Inc., California Central Airlines, Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, Robin Airways, Inc., Southwest Airways Company, Trans World Airlines, United Air Lines, Inc., and Western Air Lines, Inc.

The effective date of this decision shall be fifteen (15) days after the date hereof.

Dated at San Francisco, California, this 24th day of April, 1951.

R. E. Mittelstaedt,
Justus F. Craemer,
Harold P. Huls,
Kenneth Potter,
Peter E. Mitchell,
Commissioners.

APPENDIX "D"

CALIFORNIA CONSTITUTION

Article XII

Sec. 17. All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation, organized for the purpose, under the laws of this State, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other

railroad, and shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination.

SEC. 20. No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the Railroad Commission provided for in this Constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.

SEC. 21. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates; provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. The Railroad Commission shall have power to authorize the issuance of excursion and commutation tickets at special rates. Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation

to any shipper on account of the rates charged to said shipper being excessive or discriminatory; provided, no discrimination will result from such reparation.

SEC. 22. The Railroad Commission is continued in existence and the Public Utilities Commission, which shall consist of five members. The commission shall be appointed by the Governor from the State at large; provided, that the Legislature, in its discretion, may divide the State into districts for the purpose of such appointments, said districts to be as nearly equal in population as practicable; and provided further that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the Governor immediately after the adoption of this section, to hold office during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of the members elected to the Senate, except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day of the next regular or special session of the Legislature. Commissioners appointed for regular terms shall, at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices. The Legislature shall fix the salaries of the commissioners, but pending such action the salaries of the commissioners, their officers and employees shall remain as now fixed by law. The Legislature shall have the power, by a two-thirds vote of all members elected to each house, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All

of said commissioners shall be qualified electors of this State, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said Public Utilities Commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of Public Utilities Commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of

accounts to be kept by all railroad and other transportation companies.

No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the "Railroad Commission Act" of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five Commissioners provided for herein.

Whenever in this Constitution or the laws of this State "Railroad Commission" is used, it shall be deemed to refer to the Public Utilities Commission.

SEC. 23. Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this State, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Rail-

road Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and country, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the Railroad Commission as provided by law; and provided, further, that where any such city and county or incorporated city or town shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the Railroad Commission in the manner prescribed by the Leg-

islature; and provided, further, that this section shall not affect the right of any city and county or incorporated city or town to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. Nothing in this section shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith.

SEC. 24. The Legislature shall pass all laws necessary for the enforcement of the provisions of this article.

UNITED STATES CONSTITUTION

PARAGRAPH 3, SECTION 8,

ARTICLE I

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

CIVIL AERONAUTICS ACT OF 1938 AS AMENDED (49 U. S. CODE 402 et seq)

SEC. 2. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

SEC. 205(a) (49 U. S. Code 425(a)). The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

SEC. 301 (49 U. S. Code 451). The Administrator of Civil Aeronautics is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator of Civil Aeronautics shall cooperate with the Board in the administration and enforcement of this Act.

SEC. 401(a) (49 U. S. Code 481). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

SEC. 403(a) (49 U. S. Code 483). Every air carrier . . . shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it . . . Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. . . .

SEC. 403(b) (49 U. S. Code 483(b)). No air carrier . . . shall charge or demand or collect or receive a greater or less or different compensation for air transportation . . . than the rates, fares, and charges, specified in its currently effective tariff; and no air carrier . . . shall, in any manner or by any devise, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified. . . .

SEC. 404(a) (49 U. S. Code 484(a)). It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor . . . ; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, . . .

SEC. 601(a) (49 U. S. Code 551(a)). The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interests of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing and overhaul; and (C) in the discretion of the Board, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Board may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Board may find necessary to provide adequately for safety in air commerce.

(7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.

SEC. 902(a) (49 U. S. Code 622(a)). Any person who knowingly and willfully violates any provision of this Act (except titles V, VI and VII, or any order, rule, or regulation issued under any such provision or any term, condition or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

SEC. 902(d) (49 U. S. Code 622(d)). Any air carrier or foreign air carrier, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of this Act, or who, by any device or means, shall, knowingly and willfully, assist, or shall willingly suffer or permit, any person to obtain transportation or services subject to this Act at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than $100 and not more than $5,000.

SEC. 1002(d) (49 U. S. Code 642(d)). Whenever, after notice and hearing, . . . the Board shall be of the opinion

that any individual or joint rate, fare, or charge demanded, . . . by any air carrier for interstate or overseas air transportation, . . . is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge . . . thereafter to be demanded . . .

SEC. 1005(e) (49 U. S. Code 645(e)). It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Board under this Act affecting such person so long as the same shall remain in effect.

DEC 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 465

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EVERETT C. MCKEAGE,
Chief Counsel;

WILSON E. CLINE,
Associate Counsel,
514 State Building,
San Francisco, California,
Counsel for Public Utilities Commission of the State of California.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18,427

WESTERN AIR LINES, INC.,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent-Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Public Utilities Commission of the State of California, respondent and appellee (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of Western Air Lines, Inc., petitioner and appellant (hereinafter referred to as Western), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

Western is regularly engaged as a common carrier in the business of carrying passengers by air. Among others its operations include both standard and coach-class flights

between the Los Angeles area airports and the San Francisco Bay area airports and vice versa. On its coach-class flights between these airports Western carries passengers whose journeys are wholly within the State of California and passengers whose flights are only segments of interstate journeys, but on these air coach flights Western carries no U. S. mail.

Western has had tariffs covering its intrastate operations continuously on file with the Commission since June 21, 1945. The fares under consideration in this appeal are the one-way adult fares for coach-class passenger air service between the Los Angeles area airports and the San Francisco Bay area airports.

These same fares were the subject of investigatory proceedings instituted on the Commission's own motion against various air carriers in 1949, in which proceeding both Western and its subsidiary Western Air Lines of California made appearances. In Decision No. 43932 (March 14, 1950), 49 Cal. P. U. C. 494, issuing out of this proceeding, the Commission found that it had authority to institute such proceedings under Article XII of the California Constitution and pursuant to such authority the Commission found that the one-way fares of $9.95 and $9.99 then being charged had been shown to be reasonable.

Subsequently Western made application to the Commission by letter dated February 7, 1951, to increase its intrastate one-way adult coach-class fares between Los Angeles and Oakland/San Francisco from $9.95 to $11.70 to be effective March 1, 1951. The letter stated that the application was being made under the authority of Section 20, Article XII of the California Constitution.

Shortly thereafter and before March 1, 1951, United Air Lines, Inc. (hereinafter called United), Pacific Southwest Airlines and California Central Airlines, the only other air

carriers operating under coach-class fares between the Los Angeles area and the San Francisco Bay area, mailed applications to increase their intrastate one-way adult coach-class fares to $11.70 on March 1, 1951.

The evidence subsequently introduced at the Commission hearings showed that all these applications for fare increases had been filed pursuant to request by the Civil Aeronautics Board that these air carriers increase their coach-class fares between the Los Angeles area and the San Francisco Bay area to $11.70 effective March 1, 1951. That the Civil Aeronautics Board intended these requests to apply to intrastate fares is made clear by the fact that they were directed to Pacific Southwest Airlines and California Central Airlines, both of which are noncertificated air carriers engaged solely in intrastate operations wholly within the State of California, as well as to United and Western.

As the information submitted in support of the various applications filed with the Commission was not sufficient to warrant the ex parte authorization of the requested increases, the tendered tariff pages were rejected. Nevertheless, on March 1, 1951, California Central Airlines, United and Western proceeded to increase their fares to $11.70 without Commission authorization. As a result on March 6, 1951, the Commission issued its order of investigation.

Hearings were held in Los Angeles on March 10 and March 27, 1951. At the outset and throughout the course of the hearings, California Central Airlines, United and Western made clear their contention that the Commission had no jurisdiction over their fares, United and Western both claiming lack of jurisdiction by reason of the Federal Constitution as well as the California Constitution. However, at the March 27, 1951, hearing all three did submit evidence in justification of the intrastate coach-class fare

increases and sought Commission approval of the applications which previously had been filed.

On March 19, 1951, Pacific Southwest Airlines refiled its application, this time with sufficient supporting data to enable the Commission to act favorably thereon. On March 20, 1951, the Commission ex parte authorized Pacific Southwest Airlines to increase its coach fares, and pursuant to such authorization its coach-class fares for the first time were increased to $11.70 effective March 28, 1951.

The Commission issued its Decision No. 45624, 50 Cal. P. U. C. 563, April 24, 1951, a copy of which decision appears as Appendix C attached to Western's Jurisdictional Statement. The order therein authorized California Central Airlines, United and Western to increase their intrastate one-way adult coach-class fares for transportation of passengers between the San Francisco Bay area airports and the Los Angeles area airports to $11.70 and directed these three air carriers to make reparation, wherever possible, to passengers paying coach fares between said airports in excess of the authorized fares. The effective date of the order was May 9, 1951. California Central Airlines, United and Western filed timely petitions for rehearing with the Commission, all of which petitions were denied by the Commission by decisions dated May 15, 1951.

In the meantime on May 9, 1951, Western, pursuant to Commission Decision No. 45624, supra, filed its revised tariff covering intrastate air coach-class fares between the Los Angeles area airports and the San Francisco Bay area airports, effective May 9, 1951. Likewise United and California Central Airlines filed revised tariffs covering such fares.

California Central Airlines upon denial of its petition for rehearing acquiesced in the order of the Commission and

indicated it would proceed with reparation, wherever possible.

June 14, 1951, United and Western filed petitions for writs of review, of the Commission Decision No. 45624, supra, with the California Supreme Court, S. F. No. 18426 and S. F. No. 18427, respectively. Both petitions were denied by the California Supreme Court by orders issued without opinion, filed August 2, 1951. On August 16, 1951, Western filed with the California Supreme Court a petition for rehearing of the order denying the writ of review and on August 30, 1951, the California Supreme Court denied this petition for rehearing by order again without opinion.

On October 26, 1951, both United and Western filed appeals from the orders of the California Supreme Court with the United States Supreme Court. If hearings be granted on these appeals this Commission will in due time move that the United States Supreme Court consolidate these appeals for hearing.

II. Statement of the Issues on Appeal

Western on page 12 of its jurisdictional statement has set forth two basic questions as follows:

(1) Has the Civil Aeronautics Act of 1938, as amended, (52 Stat. 977, 49 U. S. Code 401 et seq.) pre-empted the entire field of civil aviation to the exclusion of the right or power of any state or of any state agency to exercise jurisdiction or authority over commercial air transportation?

(2) Is the Order of the Public Utilities Commission of the State of California purporting to regulate the air coach tariff over an interstate segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of subsection 3 of Section 8, Article I of the Constitution of the United States?

We believe both of these questions to be nondefinitive statements of the true issues which are involved in this appeal.

Question (1) is so broad as to require the Court to consider both economic and safety regulation under the Civil Aeronautics Act. The order of the Commission, since it relates only to fares, is limited to economic regulation of air carriers.

Also question (1) as stated by Western would require the Court to consider whether the Civil Aeronautics Act precludes the Commission from regulating the intrastate fares charged intrastate passengers by a non-certificated carrier engaged in commercial air transportation wholly within the State of California and carrying only intrastate passengers. Admittedly Western is not such an air carrier, and as previously stated, California Central Airlines, the only such air carrier whose fares are regulated by the Commission order here under consideration, has acquiesced in its validity.

Western's Question (2) refers to an interstate segment of a Federally certificated interstate route. The route here involved is between the Los Angeles area and the San Francisco Bay area and hence is wholly within the State of California and not an interstate segment. Western carries on its coach flights both passengers whose journeys are wholly intrastate and passengers whose journeys from the Los Angeles area to the San Francisco Bay area are segments of interstate journeys.

The Commission wishes the Court clearly to understand that the Commission does not seek to exercise any jurisdiction over interstate fares. The specific fare under consideration is an intrastate fare inasmuch as the $11.70 fare is for travel between airports within the State of California. However, this intrastate fare may be charged an interstate

passenger (i.e., one whose travel between the Los Angeles area airports and the San Francisco Bay area airports is only a segment of an interstate journey), as an integral part of an interstate fare, or it may be charged an intrastate passenger (i.e., one whose entire journey is within the State of California). The Commission takes the position that its order as set forth in Decision No. 45624, supra, pertains only and could pertain only to fares which are being charged to those passengers whose journeys between the Los Angeles area airports and the San Francisco Bay area airports are intrastate journeys and not integral parts of interstate journeys. Such fares are hereinafter referred to as intrastate fares.

We believe the following questions to be more definitive of the issues before the Court in this appeal:

(1) Has the Congress through the Civil Aeronautics Act of 1938, as amended, (52 Stat. 977, 49 U. S. Code 401 et seq.) pre-empted the field of economic regulation of air carriers engaged in interstate commerce, or in the transportation of U. S. mail, or both, so as to preclude the Commission from regulating the intrastate fares charged intrastate passengers by such carriers for transportation between points in California?

(2) Does the order of the Commission regulating the intrastate fares charged intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I)?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Although the United States Supreme Court has not issued a decision specifically answering the above stated questions with respect to air carriers, this Court has considered substantially the same questions in cases involving other types of carriers and utilities and has clearly determined such issues in favor of the validity of the Commission's order. We propose to demonstrate that Western has raised no substantial Federal question by its attempted appeal.

A. *Preliminary Statement*

With respect to the general question of Commission jurisdiction over rates of air carriers, it is interesting to note that United has since November 28, 1931, submitted to this jurisdiction by having on file with the Commission either in its own name or that of a subsidiary or affiliate tariffs of its intrastate fares. Western has had tariffs of its intrastate fares on file with the Commission since June 21, 1945. Both Western and its subsidiary, Western Air Lines of California, Inc., acquiesced in Commission Decision No. 43932, 49 Cal. P. U. C. 494, which found that the Commission had authority under Article XII of the California Constitution to institute proceedings to determine the reasonableness of intrastate fares of air carriers and pursuant to such authority found that the one-way fares of $9.95 and $9.99 being assessed for airline coach-class service between Los Angeles and San Francisco had been shown to be reasonable.

The inconsistent positions taken by the petitioners are further clearly demonstrated by the fact that both United and Western filed applications with the Commission seeking approval of the $11.70 fare as an intrastate fare, and both petitioners pursuant to Commission Decision No. 45624, which is here under attack, have filed tariffs with the Com-

mission setting forth the $11.70 one-way adult fare for air-coach service between the Los Angeles area airports and the San Francisco Bay area airports.

United and Western are willing to take the benefit of Commission authorization of the increased fares but deny that the Commission has jurisdiction to exercise such authority. It is a rule of law that one may not approbate and reprobate at the same time, particularly where he accepts the benefit of the approbation. The actions of United and Western prove a clear recognition on their part (although they seek to deny it) of the lawful authority of the Commission to regulate their intrastate fares.

The Interstate Commerce Clause of the Constitution of the United States became effective in 1789, the Civil Aeronautics Act in 1938. For logical as well as historical reasons we prefer to discuss the issues outlined above in reverse order.

B. *The Order of the Commission Regulating the Intrastate Fares Charged Intrastate Passengers by Air Carriers Engaged Both in Intrastate and Interstate Commerce for Transportation Between Points in California Does Not Place Such a Burden on Interstate Commerce as to Constitute a Violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I).*

The fact that Western is engaged in interstate as well as intrastate commerce has no significance so far as the validity of the order of the Commission is concerned. The regulation of fares charged by air carriers requires no more uniformity than does the regulation of fares and rates of railroads, bus lines, truck lines, and telephone and telegraph utilities.

The speed of an airplane loses its significance when com-

pared to the speed of transmittal of a telephone or telegraph message. It is a matter of common knowledge that the separation of interstate and intrastate operations of telephone and telegraph utilities is much more difficult than the separation of the interstate and intrastate operations of passenger and freight carriers, including air carriers. However, such facts have not resulted in exclusion of state regulation of charges for intrastate telephone and telegraph messages.

It has long been held by the United States Supreme Court that until such time as the Congress preempts the entire field of regulation, both interstate and intrastate, common carriers and utilities are subject to state regulation in so far as intrastate operations are concerned, even though their interstate operations are regulated by Federal authority.

Cooley v. *Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. ed. 996;

Minnesota Rate Cases (1913), 230 U. S. 352, 57 L. ed. 1511;

Eicholz v. *Public Service Commission* (1939), 306 U. S. 268, 83 L. ed. 641;

Smith v. *Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. ed. 255;

Lindheimer v. *Illinois Bell Telephone Co.* (1934), 292 U. S. 151, 78 L. ed. 1182.

In the recent case of *Alabama Public Service Commission* v. *Southern Railway Company* (1951), 341 U. S. (Preliminary Print) 341, 345, 95 L. ed. Adv. Ops. 708, 711, the United States Supreme Court, speaking through Mr. Chief Justice Vinson, made the following statement regarding state regulation of intrastate transportation:

> "Appellee conducts an interstate business over the same tracks and by means of the same trains involved

in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 U. S. C. §§ 1, et seq. But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. • • • And Congress has since provided:

> " 'That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission].' 49 U. S. C. § 1(17(a)).

"This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.' *North Carolina* v. *United States,* 325 U. S. 507, 511, 89 L. ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer* v. *Massachusetts,* 308 U. S. 79, 84 L. ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service)."

The United States Supreme Court has held that the states may even regulate *interstate* commerce of a local nature until such time as the Congress has preempted the entire field of interstate commerce.

Kelly v. *Washington* (1937), 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13;

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission,* (1951), 341 U. S. (Preliminary Print) 329, 333, 95 L. ed. Adv. Ops. 673, 676.

The United States Supreme Court in upholding state regulation of direct sales of gas for consumptive use by a natural gas company which was engaged in interstate commerce, through the majority opinion delivered by Mr. Justice Minton, in the case of *Panhandle Eastern Pipe Line Co.*

v. *Michigan Public Service Commission*, (1951), 341 U. S. (Preliminary Print), 329, 333, 95 L. ed. Adv. Ops. 673, 676, went even further to state:

> "* * * In the absence of federal regulation, state regulation is required in the public interest. * * *"

C. *The Congress Through the Civil Aeronautics Act of 1938, As Amended (52 Stat. 977, 49 U. S. Code 401 et seq.) Has Not Pre-empted the Field of Economic Regulation of Air Carriers Engaged in Interstate Commerce, or in the Transportation of U. S. Mail, or Both, So As to Preclude the Commission from Regulating the Intrastate Fares Charged Intrastate Passengers by Such Carriers for Transportation Between Points in California.*

Section 1 (2) of the Civil Aeronautics Act (49 U. S. Code 401 (2)) defines "air carrier" as one engaged in "air transportation", and "air transportation" is defined in Section 1 (10) (49 U. S. Code 401 (10)) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

Air carrier economic regulation under Sections 401, 403 and 404 of the Civil Aeronautics Act (49 U. S. Code 481, 483 and 484) is limited to the regulation of "air transportation". The rates, fares and charges regulated by the Civil Aeronautics Board under these sections are "rates, fares, and charges for air transportation".

There is nothing in the Civil Aeronautics Act which gives the Civil Aeronautics Board jurisdiction over intrastate fares charged intrastate passengers by "air carriers", nor is there anything in the Act which prevents the states from exercising jurisdiction over such fares.

Even though the provisions of the Civil Areonautics Act were not clear in this regard, the United States Supreme Court has held that any doubt should be resolved in

favor of state power. We quote from the majority opinion of Mr. Justice Brandeis in *Arkansas Railroad Commission* v. *Chicago, R. I. & P. Co.* (1927), 274 U. S. 597, 603, 71 L. ed. 1224, 1228:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. * * *"

Although Section 406(b) of the Civil Aeronautics Act (49 U. S. Code 486(b)) permits the Civil Aeronautics Board in fixing reasonable rates for the transportation of mail by air to consider the need of the air carrier and its revenue from other sources, such section does not preclude state regulation of intrastate passenger fares. The California Public Utilities Commission is as duty bound to fix just and reasonable intrastate fares as is the Civil Aeronautics Board duty bound to fix just and reasonable interstate fares. There are adequate administrative and judicial remedies should either governmental regulatory agency become remiss in its duty.

Rosenhan v. *United States* (1942), 131 F. (2d) 932, cert. den. 318 U. S. 790, 87 L. ed. 1156, has previously been cited by Western as case authority to show that the Federal government has preempted the entire field of air carrier regulation. This case relates to the safety regulatory provisions of the Civil Aeronautics Act, however.

Federal regulation of the safety phase of the operations of air carriers is pursuant to Section 601 of the Civil Aeronautics Act (49 U. S. Code 551) which grants the Civil Aeronautics Board authority over "air commerce". Section 1 (3) of the Act (49 U. S. Code 401 (3)) defines "commerce" to mean "interstate, overseas, or foreign air com-

merce or transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign commerce".

A review of the definition of "air commerce" and the safety provisions of the Civil Aeronautics Act clearly demonstrates that the Congress knows how to use language to extend Federal regulation to intrastate activities when it desires to do so.

Western's appealing language on page 13, line 18 through page 15, line 28 of its Jurisdictional Statement had better be directed to the Congress of the United States than to the Supreme Court of the United States. Indeed similar language has undoubtedly already been directed to the Congress and its Congressional committees during the consideration of the numerous bills presented to the Congress *which have sought to extend Federal economic regulation to intrastate operations of air carriers.*

In this connection we refer this Court to the legislative history of the following bills, none of which has been enacted:

78th Congress—Lea-Bailey Aviation Bill introduced as H. R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill, S. 541; Lea Bill, H. R. 3383.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

A concise discussion of these bills and the opposition they met in the Congressional Committees will be found in the following reports of the proceedings of the National Association of Railroad and Utilities Commissioners:

1944 N. A. R. U. C. Proceedings 221
1945 N. A. R. U. C. Proceedings 299
1946 N. A. R. U. C. Proceedings 210
1947 N. A. R. U. C. Proceedings 128
1948 N. A. R. U. C. Proceedings 69
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For a strong statement in support of the desirability of exclusive Federal regulation of all air navigation and air commerce we refer Western to the paragraphs appearing under the heading "Federal Jurisdiction" commencing on page 8 of H. R. Report No. 784, on the Civil Aviation Bill, 78th Congress—H. R. 3420, submitted by Mr. Bulwinkle, from the House of Representatives Committee on Interstate and Foreign Commerce. This statement commences and reads in part as follows:

> "The inherent nature of aviation requires Federal regulation of all air navigation and air commerce. Such regulation is provided for in the bill".

We also quote from the Minority Views of same report at page 41:

> "The signers of these minority views do not agree with H. R. 3420, as reported by the committee, because (1) it destroys States' rights, * * *
>
> "(b) The committee bill (by specific provisions hereinafter set forth) *takes away* [emphasis added] all rights of the States:
>
> "(1) *To regulate intrastate commerce by air,* including certificates, permits, rates, and all other matters normally subject to the State regulation of intrastate operations of public utilities."

As previously stated the minority views prevailed and the Congress did not *take away* the rights of the States. H. R. 3420 was never enacted into law.

"Appropriate Areas of State Economic Regulation" by Frederick G. Hamley (1946), 11 Law and Contemporary Problems 488, is an excellent article setting forth views in support of the continuance of state regulation of air carriers.

Western's Jurisdictional Statement presents a bold attack upon our Federal form of government. This is not the first time that an attempt has been made to argue contrary to the spirit and the principle upon which our Federal form of government was founded. But the Supreme Court of the United States has consistently held that it will not construe an act of the Congress as superseding State authority and jurisdiction unless the statute be clear and unequivocal on the point. Mr. Justice Jackson, speaking for the Supreme Court of the United States, clearly reiterated these principles in the case of *Davies Warehouse Co.* v. *Bowles* (1944), 321 U. S. 144, 153-155, 88 L. Ed. 635, 642-643:

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent.
>
> * * * * * * *
>
> "At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. * * *
>
> "At least in the absence of congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden

but one implied by the terms of the legislation when viewed against the background of our form of government."

D. *Western Can Comply with the Reparation Order of the Commission without Violating the Provisions of Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)).*

Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)) in part provides:

> "(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; * * *".

This Court will note that the terms used therein are "air carrier" and "air transportation" as defined in the Act and not "air commerce". Hence the section applies to interstate and not to intrastate fares. Concededly the order of the Commission applies only to intrastate fares.

Even though Western does find itself in a dilemma, it has no right to complain, as its own voluntary actions have created the situation. Air carriers, like other common carriers, advisedly should obtain all the necessary authorizations from the proper regulatory bodies, both State and Federal, before placing into effect an increase in fares.

IV. Conclusion and Motion to Dismiss or Affirm

We respectfully submit that the questions presented in this appeal have long ago been so definitely determined that no substantial questions are presented by this appeal entitling Western to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE appellee and respondent respectfully moves that the within appeal be dismissed or that the orders of the Supreme Court of the State of California and the decision and order of the Commission be affirmed.

Dated: San Francisco, California.
November 8, 1951.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel;
WILSON E. CLINE,
Associate Counsel,
Attorneys for Appellee and Respondent,
Public Utilities Commission of the
State of California.

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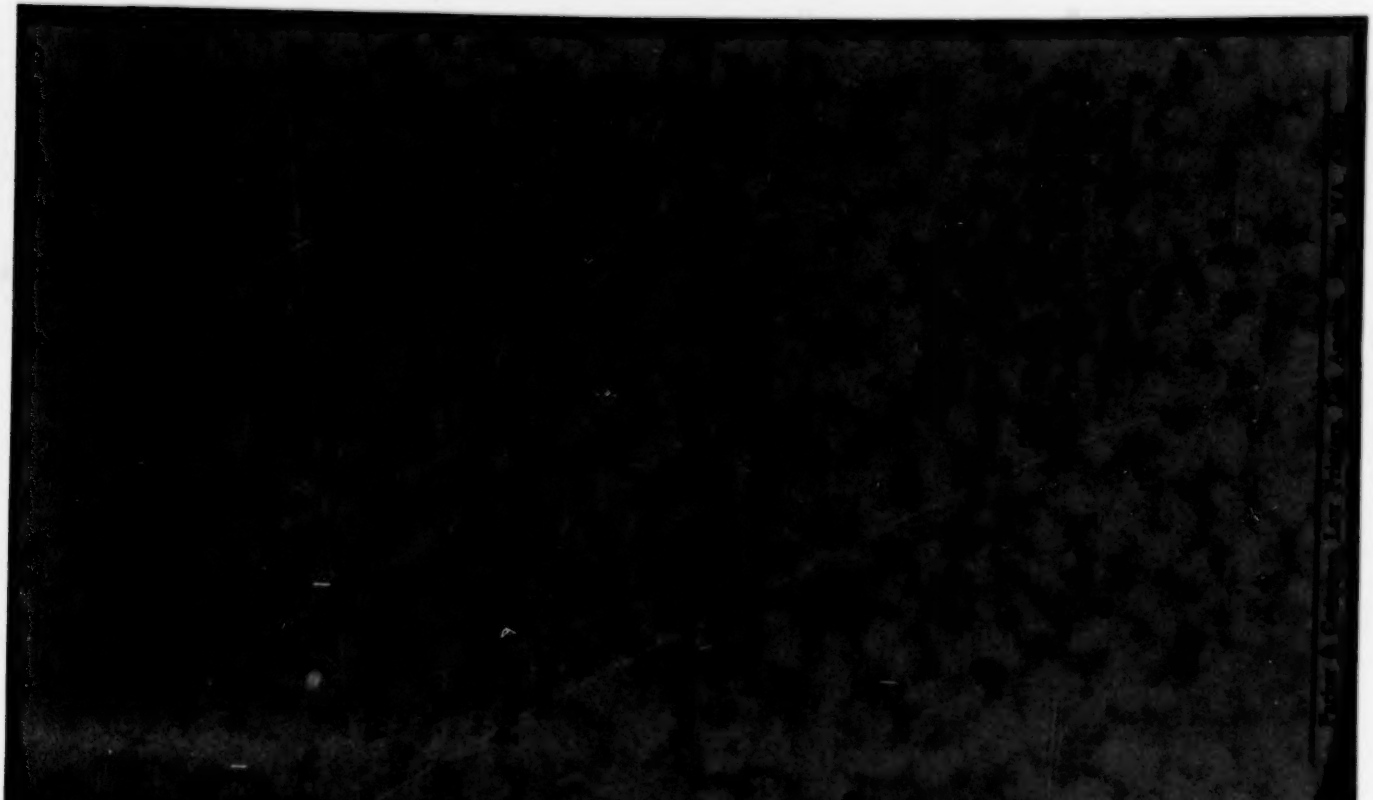

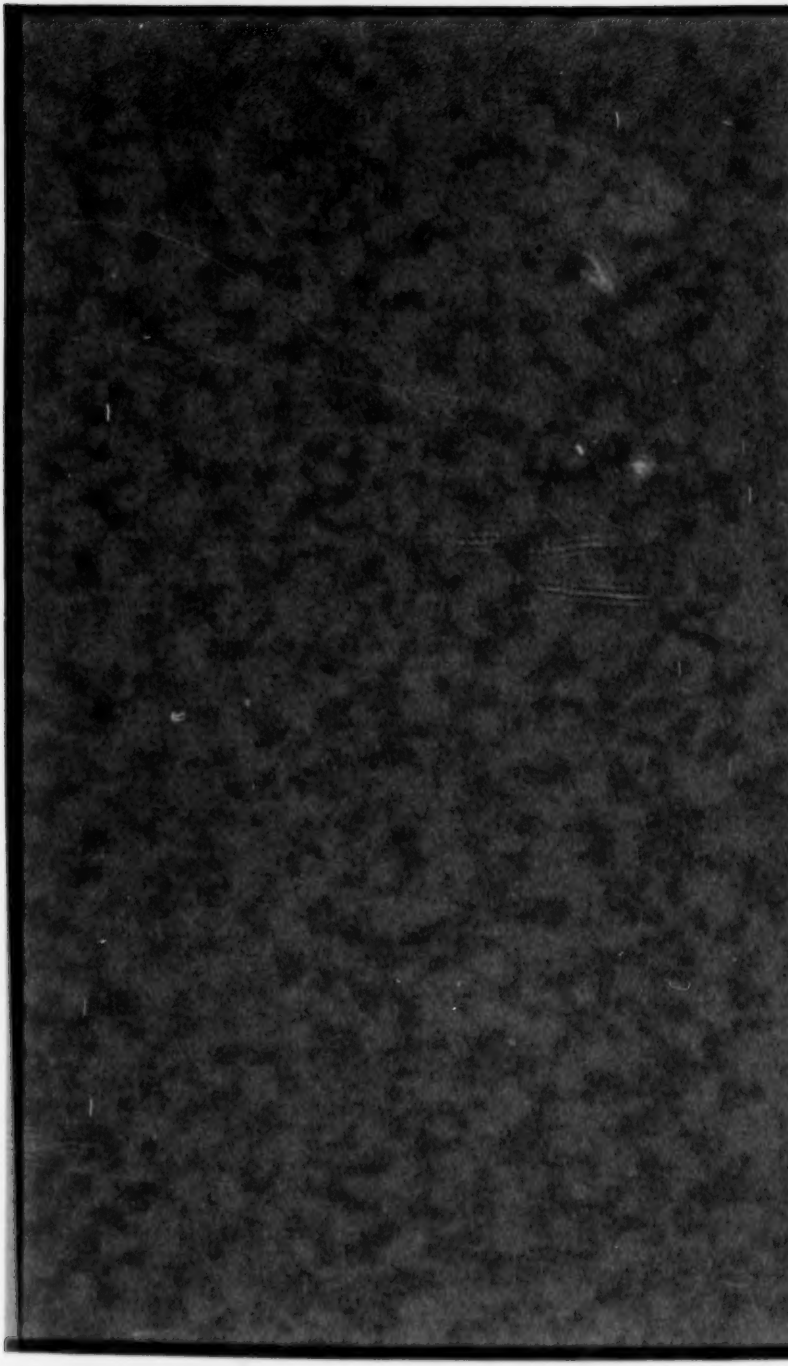

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